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Supreme Court of the United States

OCTOBER TERM, 1943

No. [illegible]

[illegible] et al., etc.,

and

Lawrence S. [illegible], et al., etc.,

Petitioners,

against

Howe Gowen and James D. Carpenter, Jr., etc.,

Respondents.

PETITIONERS' REPLY BRIEF

DAVID PAINE,
LAWRENCE GREENBAUM,
Counsel for Petitioners.

Dated, September 8, 1943.

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Supreme Court of the United States

OCTOBER TERM 1943

No. 183

B. H. Inness Brown, et al., etc.,

and

Lawrence S. Greenbaum, et al., etc.,

Petitioners,

against

John Gerdes and James D. Carpenter, Jr., etc.,

Respondents.

PETITIONERS' REPLY BRIEF

It seems requisite to the Attorneys that a brief reply be submitted in view of various fallacious arguments and erroneous statements of fact contained in the Trustees' brief.

I

Alleged error in the record—the constitutional question.

The Trustees' assertion (Br., p. 8) that the opinion certified by the Court of Appeals is erroneous in stating that the appeal was upon constitutional grounds is utterly without foundation. By their own admission (Brief, p. 8) and as the record plainly shows (R. 117) they appealed on constitutional grounds, and this Court will not question the authenticity of the opinion so certified merely because in

the temporary Advance Sheets (not the final official reports) the State Reporter erroneously failed to state that the appeal was on constitutional grounds as well as by permission. Indeed, as will appear presently, the opinion of the Court of Appeals shows plainly that the constitutional and federal questions were the sole and decisive factors upon which the decision of that Court rests.

II

A federal question was presented and necessarily passed upon. The issue was not determined as a matter of local State law.

The Trustees' principal argument is that the State Court decided the issue upon a non-federal ground, namely, that in fact the Attorneys had agreed that their compensation would be fixed by the Reorganization Court and that such contract had not been abrogated by discharge of the Attorneys. The contention that such agreement was made was expressly rejected by both lower Courts whose findings with respect thereto were undisturbed by the Court of Appeals.

In their brief (p. 11) the Trustees quote certain language of the Court of Appeals to make it appear that the Court determined "as a matter of fact" that because the Attorneys approved the Plan of Reorganization their retainer was subject to the condition that their fees would be fixed by the Federal Court. The quoted portion of the opinion has no relation whatever to the claim that the Attorneys approved the Plan or participated as parties therein. The opinion of the Court of Appeals is silent upon this point. An examination of the Court's opinion will show that the quoted portion refers rather to the Court's construction of the provisions of the Bankruptcy Act which the Court found constituted, in the absence of an express agreement, an implied agreement that the fees of the

Attorneys would be fixed by the Federal Court. Obviously, the determination that certain provisions of the Bankruptcy Act must be deemed to constitute the terms of an implied contract between the Attorneys and the Trustees is not the determination of a question of local law but rather the determination of a federal question involving the construction of the Bankruptcy Act.

It is clear from the opinion of the Court that its decision rested solely upon the federal question. Thus, Judge Finch states the sole issue to be "whether the State Court * * * has jurisdiction * * * or whether exclusive jurisdiction is in the Federal Court * * *" (R. 125), and his conclusion that jurisdiction rests in the Federal Court is based wholly upon the argument that the Constitution and the National Bankruptcy Act place an exclusive and non-delegable jurisdiction in that Court. Only when Judge Finch has finished his argument in support of his conclusion does he refer to the relationship between the Attorneys and the Trustees, and then only by way of distinguishing the Federal cases which, the dissenting Judges of the Court of Appeals held, placed jurisdiction in the State Court. The consideration given to the federal question in the majority opinion and the dissent based upon *Sherman* v. *Buckley*, 119 F. (2d) 280, cert. den. 314 U. S. 657, contrasted with the incidental reference to the termination of the Attorneys' services is cogent evidence that the Court of Appeals was not disposing of the matter upon the question of local State law.

The Trustees, in order to distinguish the instant case from *Sherman* v. *Buckley, supra*, make the unwarranted statement (Trustees' Brief, pp. 6, 7) that there was "no substitution or application for substitution of attorneys or of the Trustees *pro se* * * *." The fact is that Justice Walter in his opinion (R. 99) found that there was an attempt by these two Trustees to substitute themselves in the lawsuits (both being attorneys) in place of the petitioners. Neither the Appellate Division, which affirmed without opinion, nor the Court of Appeals, which reversed on the opinion of Judge Finch, reversed this finding in any

respect. Judge Finch did not even mention the matter in his opinion. Concededly, the entry of judgment in the action terminated the services of the Attorneys as a result of the letter of June 3, 1941 (R. 22). After that date steps were taken on behalf of the Trustees by someone to bring about a settlement of the lawsuits. The Trustees say they did not act *pro se* and that no attorneys were substituted. It is hard to understand then how any settlement was effectuated or any judgments satisfied. Of course, the stipulation of July 9, 1941 (R. 24-6), embodied as an order by Judge Fake on July 10, 1941 (R. 26), specifically provides for a consent to substitution in these same suits (R. 25). As Judge Hand said in *Sherman* v. *Buckley, supra,* the State Court had the right "as a condition upon the substitution of new attorneys to require that the charging lien of the displaced attorneys must be liquidated" (p. 282). (See also, *Matter of Krooks,* 257 N. Y. 329; *Matter of Tillman,* 259 N. Y. 134; *Matter of Weitling,* 266 N. Y. 184.)

On page 12 of their brief the Trustees state "that the Attorneys conceded that if there were no wrongful discharge * * * the state court would have no jurisdiction * * *." This is misleading. There is no claim by the Attorneys that the discharge was "wrongful". The claim is that the discharge gave the Attorneys the immediate right to exercise the lien which was given them by Section 475 of the Judiciary Law and which existed from the time the actions were started. It is too well known to justify any question that a client can discharge his attorney at any time for good reason, or, as here, with no reason. Hence, there cannot very well be a "wrongful" discharge of an attorney (see *Matter of Krooks,* 257 N. Y. 329, 331).

The suggestion contained in the Trustees' argument that the lien is extinguished upon the entry of judgment, thus permitting unconscionable clients to appropriate the fruits of the attorneys' labors, is contradicted by the history of attorneys' liens and the decided cases in New York. As Justice Walter stated (R. 100), the charging lien of an attorney at common law "did not arise until judgment was

recovered, whereas under the statute which is now section 475 of the Judiciary Law it exists upon the cause of action from the commencement of the suit or proceeding for the enforcement thereof." Certainly it was not the intention of the Legislature to abolish the lien, which the common law gave, once a judgment had been entered, but rather to enlarge the attorneys' rights by making the lien effective from the commencement of the action. Yet this would be the effect if the construction sought by the Trustees is sound.

III.

The federal question is not moot.

Except for one point, the argument advanced in Point II of the Trustees' brief has been completely answered in petitioners' main brief (see Main Brief, Points I and II). The single exception is the argument that the federal question of jurisdiction is moot because the Attorneys are bound by the Plan of Reorganization and the order confirming it, which provides that the Federal Court shall fix fees. This argument is based upon the wholly unfounded statement that "The attorneys were parties to the reorganization proceeding" (Trustees' Brief, p. 15). This misleading inference is drawn from the fact that as attorneys for security holders in the reorganization proceedings petitioners, on behalf of their clients, approved the Reorganization Plan. They were not parties at all. They were retained to bring suit almost two years before the Plan was confirmed (R. 31). Their lien attached upon the commencement of the suit (see Sec. 475, Jud. Law; Petitioners' Brief, pp. 5, 6).

It is perhaps sufficient to note that the Trustees have made no attempt by citation to the record to support their erroneous statement that petitioners were parties to the Plan, but the conclusive answer to that argument is that the Court of Appeals failed to adopt it, and since the Court

made no mention thereof, presumably it rejected it and affirmed the findings of the lower Courts (R. 108, 118-19) to the effect that the attorneys were not bound by the Plan of Reorganization, that the Plan was not *res judicata* upon the question of the Attorneys' fees, and that the Attorneys did not agree to waive their liens accorded to them under Section 475 of the Judiciary Law.

On page 3, in paragraph 3, and at the bottom of the page, and also on page 16, the Trustees seek to have the Court infer that the Attorneys by enforcing their lien have "attacked collaterally" the Plan of Reorganization. No attack has been made on that Plan collaterally or in any other way. The lien of these Attorneys arose outside the scope of that Plan and long prior to the submission of the Plan. It is quite independent of the Plan and its enforcement in no respect infringes upon the Plan.

CONCLUSION

The question here is one of importance. It involves the construction of the Bankruptcy Act and of the United States Constitution. It should be passed upon finally by this Court. The New York Court of Appeals by a bare majority has come to a conclusion quite contrary to that of several of the Circuit Courts of Appeals and apparently to the United States Supreme Court.

The writ should be allowed.

Respectfully submitted,

DAVID PAINE,
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Dated, September 8, 1943.